Supreme Court, U.S.
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No. 93-609

In The

Supreme Court of the United States

October Term, 1993

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO., INC., GOLDMAN SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS, INC.,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Contrary to Petitioners' contentions, there is no 200 year old bright line of decisions emanating from this Court that controls this case. Furthermore, the Fifth Circuit, in finding Section 27A(b) constitutional did not breach "founding" principles "premised on the separation of powers and due process doctrines that are as old as the Republic itself." (Petition for a Writ of Certiorari at p. 3, hereafter "Pet. at p. ___").

Simply stated, Section 27A(b) is a constitutional enactment. In enacting Section 27A(b), Congress was exercising its legislative prerogative based upon two simple and well settled principles – (1) that the power of Congress to regulate commerce is supreme and plenary; and (2) that the creation or duration of statutes of limitation are a matter of legislative grace peculiarly within the province of the Congress.

One need look no further than this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), to establish that it is Congress' constitutional prerogative to set statutes of limitations for persons defrauded in the sale of securities traded on national markets. In *Lampf*, this Court devoted a major portion of its discussion to determining, in the absence of an express statute of limitation, what Congress intended to be the statute of limitations for claims brought under Section 10(b). In enacting Section 27A, Congress expressly stated what it intended the statute of limitations to be for a discreet class of persons, those plaintiffs who had cases pending at the time that *Lampf* was announced and who suffered dismissals as a result. In essence, Congress

determined that it was in the best interests of interstate commerce, and the protection of the integrity of the securities markets, that persons who might be denied a Federal remedy by operation of the decision in *Lampf*, be given a new remedy. There is nothing wrong with this. In fact it is entirely beyond constitutional reproach.

Under its plenary Commerce Clause powers, Congress could have created an entirely new cause of action in the class of persons covered by Section 27A(b), made the legislation retroactive,[1] and given it as long a statute of limitations as it desired – *e.g.*, 10 or even 20 years. In enacting Section 27A(b) Congress did less than what it constitutionally could. Moreover, although the procedural requirements set forth in Section 27A(b) state that in order for these plaintiffs to obtain the benefit of Section 27A(b) they must seek "reinstatement", the constitutional propriety of Section 27A(b) should not be judged in this context.

The fact is that Petitioners do not contest that Congress, if it so desired, could have created an entirely new cause of action for this discreet class of persons, identical to that of Section 10(b), with a statute of limitations as long as Congress desired. Petitioners merely contest that Congress chose to articulate this new cause of action in the procedural language of "reinstatement." The fact that

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[1] "It is clear, however, that Congress may, without violating the due process clause, enact legislation imposing economic burdens retroactively if it is justified by a 'legitimate legislative purpose furthered by rational means.' " *Licari v. C.I.R.*, 946 F.2d 690, 693 (9th Cir. 1991) (citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)).

Congress chose to use the linguistic shorthand of describing this newly created right or cause of action in the procedural context of a "reinstatement" cannot and should not act as a delimiter on Congress' constitutional prerogative in regulating interstate commerce.

In short, the core of Petitioners' contentions center upon Section 27A(b)'s use of the term reinstatement. They view the use of the term reinstatement in Section 27A(b) as an encroachment upon the judiciary and a violation of their purported due process interests in the final judgment entered on the basis of *Lampf*. Apart from the fact that these contentions are without merit, the fact is that since Congress could have done more (*e.g.*, created an entirely new cause of action), that it phrased Section 27A(b) in terms of something less (*e.g.*, reinstatement) does not make it unconstitutional.

This is not something worthy of this Court granting a writ of certiorari, regardless of the fact that there is conflict amongst the circuits, due to the Sixth Circuit's recent decision in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993).

II. PROCEDURAL HISTORY

On March 1, 1991, Respondent, Pacific Mutual Life, filed a Section 10(b) securities and common law fraud action against, *inter alia*, Goldman Sachs, Morgan Stanley, Salomon Brothers, and Ernst & Young, (hereafter "Petitioners"), arising out of Petitioners' involvement with the 1987 merger of the Republic and InterFirst banks. At the time that Respondent's action was filed, the law governing the statute of limitations for Section 10(b) claims

brought in Texas Federal Courts was controlled by the Fifth Circuit's opinion in *Sioux Ltd., Sec. Litigation v. Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990), holding that there was a four-year statute of limitations. Since the complaint alleged that the wrongful conduct of Petitioners occurred within this four-year period, Respondent's claim was timely filed under the then applicable law of the Fifth Circuit.

On June 20, 1992 the Sup-eme Court, in *Lampf*, held that a claim under Section 10(b) must be commenced within one year after the discovery of facts constituting the violation and within three years after such violation. *Id.* at 2782, and n. 9.

On the authority of the *Lampf* decision and in a series of orders, the District Court granted Petitioners' motions to dismiss Respondent's Section 10(b) claims with prejudice as being time-barred and refused to exercise pendent jurisdiction over Respondent's state law claims.

In light of this Court's clear pronouncement as to the retroactivity of the *Lampf* decision,[2] Respondent elected not to appeal this ruling and instead chose to pursue its state law claims in Texas State Court.

In 1991 Congress enacted Section 27A, and it was signed into law and became effective on December 19, 1991. It provided in pertinent part:

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[2] See, *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991).

(b) Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 –

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991. (See U.S.C. Sec. 78aa-1)

On January 31, 1992, within the sixty day period provided for in Section 27A for previously dismissed actions to be reinstated, Respondent filed its Motion To Reinstate. Petitioners opposed this motion on the grounds that Section 27A was unconstitutional. On July 13, 1992 the District Court denied Respondent's motion to reinstate based upon its view that Section 27A was unconstitutional for two primary reasons: (1) Section 27A offended the separation of powers because it abolished the retroactive application of *Lampf* and thus impermissibly invaded the powers of the judiciary to have their decisions apply retroactively; and (2) Section 27A impermissibly divested Petitioners of their vested right in the finality of the District Court's previous judgment of dismissal of Respondent's claims.

Respondent appealed this dismissal to the Fifth Circuit, and on July 20, 1993, the Fifth Circuit reversed, finding that Section 27A(b) was constitutional.

III. ARGUMENT

A. Section 27A Does Not Operate To Divest Defendants Of Any "Vested Rights"

Petitioners contend that they had a vested right in the final judgment of dismissal dated August 16, 1991, which could not be constitutionally "revived" through a subsequent enactment of Congress. The first error in this contention centers upon the Petitioners' misapprehension of Congress' powers in the regulation of interstate commerce. Since Congress' powers in this area entitle it to create retroactive causes of action, what it did in connection with Section 27A(b) is entirely constitutional.

Moreover, as a matter of general constitutional principle no defendant has a vested right in a claim being barred by a statute of limitation. In *Jago v. Van Curen*, 454 U.S. 14, 17 (1981), this Court reiterated its view that, "In this case, as in our previous cases, '[t]he question is not merely the "weight" of the individual's interest, *but whether the nature of the interest is one within the contemplation of the "liberty or property language of the Fourteenth Amendment."* ' "[3] (Emphasis added.)

Petitioners are hard pressed to argue that their due process rights have been violated when they were timely sued under then applicable law, only to be temporarily saved by an unexpected intervening Supreme Court decision, and then six months later have that liability attach again through prompt Congressional action.

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[3] Although, *Jago* was a case decided under the Fourteenth Amendment, its overall maxim regarding the limits of property interests protected by due process is equally applicable herein.

This is particularly so where, as here, Respondent was, at the time of its motion for reinstatement pursuant to Section 27A(b), pursuing state law claims based upon the same nucleus of operative facts as its federal securities claims.

As one court has noted, the vested rights doctrine, "rests on twin constitutional bases, one that a final judgment affords the parties rights that may be equated to a form of property enjoying due process protection, and the second that separation of powers principles preclude legislative reopening of adjudicated cases." *Axel Johnson Inc. v Arthur Andersen & Co.*, 790 F. Supp. 476 (S.D.N.Y. 1992).

The August 16, 1991 order did not give Petitioners "an award of damages, cost[s], or the right to receive any property." *Casserly v. Shearson Lehman Hutton, Inc.*, Civ. No. 4-90-125, slip op. at 8 (D. Minn. July 2, 1992) (rejecting argument that defendant had vested right in judgment and granting a motion to reinstate a dismissed claim under Section 27A(b)). Rather, it merely deprived Respondent of a federal claim against Petitioners and a federal forum in which to litigate. Respondent still has state law claims against Petitioners arising out of the same nucleus of operative facts. Thus, although the District Court's August 16, 1991 order created what might be characterized as "a loose benefit" to Petitioners, this "benefit" simply does not rise to the level of a specific benefit protected by the due process clause and/or the vested rights doctrine.

In the one case that is closely on point to the issues raised in Petitioners' writ, this Court stated in *Chase*

Securities Corp. v. Donaldson, 325 U.S. 304 (1945), that statutes of limitation:

> [R]epresent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right . . . [litigants] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase, 325 U.S. at 314.

Since *Chase*, no decision of the Supreme Court, including *Chase*, has ever held that a defendant has a vested right in a final judgment of dismissal. Those cases that have discussed the "vested rights" doctrine in the context of a final judgment have been cases involving a judgment that has in some fashion awarded money or some other valuable property right, such that a retroactive application of a newly enacted statute would operate to deprive the litigant of an actual property right. See *Hodges v. Snyder*, 261 U.S. 600, 603-04 (1923).[4]

Other than being relieved of their liability exposure for Respondent's federal claims, the August 16, 1991 judgment did not award Petitioners any actual property. As noted above, the Court in *Chase* expressly noted that a

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[4] That a defendant does not have a fundamental right in a final judgement, and that Congress may create legislation that opens up final judgements, is reflected in the fact that Fed. R. Civ. P. Rule 60, an enactment of Congress, permits the opening of final judgements under certain circumstances.

defendant has no fundamental right in whatever protection a statute of limitations may afford in all circumstances.

Moreover, the Court in *Chase* found that the lifting of the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is not a *per se* violation of due process. *Id.* at 316. In *Chase*, the Court observed that while there might be instances where the retroactive application of a statute might invade fundamental rights, in order for this to be established the party making such a claim had to show that, independent of the fact that the defendant was exposed to a liability that was previously barred, the retroactive lifting of the bar of the statute of limitations caused some special hardship or oppression. *Id.* at 315-316. No such hardship or oppression has been shown by the Petitioners in the courts below.

For these reasons, no due process right has been established in the courts below, and as such the writ should be denied.

B. Section 27A Does Not Violate the Separation of Power Principles

Petitioners contend that Section 27A(b) reverses final judgments and thus invades the Judiciary's powers granted under Article III of the Constitution. Simply stated, this contention is premised upon the false assumption that Section 27A(b) is designed to reverse the judgments entered upon the basis of *Lampf* as opposed to creating a new statute of limitations for a discreet class of

persons whose claims arise under a Congressional enactment promulgated under the Commerce Clause. If anything, a judicial declaration that Section 27A(b) was unconstitutional would in itself be an improper invasion of the Congress' Commerce Clause powers.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition For a Writ of Certiorari.

Dated: Chicago, Illinois
November 18, 1993

Respectfully submitted,

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